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MURDER OF INSURED BY BENEFICIARY AS DEFENSE WHEN POLICY CONTAINS INCONTESTABLE CLAUSE

A recent Alabama case (Lee v. Southern Life & Health Ins. Co., Ala. App., 98 So. 696) holds that where a life insurance policy has been in force for more than one year and contains a clause making it incontestable after one year, and risk of the beneficiary murdering insured is not excepted therein, it is no defense to an action on the policy that the insured was murdered by the beneficiary.

The rule of law that bars a beneficiary who has murdered the insured from recovering under the policy is grounded on public policy. This rule does not relieve the insurance company of liability, because it is generally held that in such case the executor or administrator of the deceased's estate may recover on the policy (7 A. L. R. 828). If there is no provision in the policy avoiding it if the insured is murdered by the beneficiary, and if there is any person without fault who has a right to the benefit of the policy, the same will be enforced (Johnston. Adm'r v. Metropolitan Life Ins. Co., W. Va., 100 S. E. 865, 7 A. L. R. 823). When the beneficiary murders the insured there is in the hands of the insurer a fund or estate created by the insured, which the beneficiary is not entitled to because he cannot invoke the aid of the courts to enforce his claim.

We have, then, a policy providing that it is incontestable, and a rule of public policy which declares that the beneficiary cannot take under the policy. Naturally, one would think that public policy would prevail in such a situation. Public policy does not relieve the insurer of liability, nor, apparently, affect its liability. It merely disqualifies the beneficiary. He cannot recover. And setting up this fact in an action brought by such beneficiary to recover on the policy is not a contest of the policy, but a mere calling attention to the fact that the plaintiff is not entitled to recover. He has no standing in court, not because of anything in the policy, but because the law disqualifies him.

The Supreme Court of Alabama, in Supreme Lodge, K. P., v. Overton (82 So. 443), held that an incontestable clause in the policy estopped the insurer from setting up the defense that the insured was killed as an escaping felon under death sentence.

In the case of Sun L. Ins. Co. v. Taylor (108 Ky. 408, 56 S. W. 668, 94 Am. St. Rep. 383), the policy provided that it should be void if the insured should die in consequence of his own criminal act. It also contained a clause that if the insured should die three or more years after its date, it should be incontestable. The insured died more than three years after the date of the policy, by his own criminal act. It was held that the insurer was precluded from setting up the defense that the insured died in consequence of his own criminal action in committing an assault

However, there are several cases holding that an incontestable clause does not prevent the insurer from contesting its liability on the ground that the insured was executed for a crime. In Scarborough v. American Nat. Ins. Co. (171 N. C., 353, 88 S. E. 482, L. R. A. 1918A 896), it is declared that the term "incontestable" means that the provisions of the policy will not be contested, not that the insurer agreed to waive the right to defend itself against a risk which it never assumed.

In the case of Collins v. Metropolitan Life Ins. Co. (27 Pa. Super. Ct. 353), the policy contained a clause that "after two years this policy shall be noncontestable except for the nonpayment of premiums as stipulated or for fraud." It was held that, "by its terms, it is not the claim presented by the assured, irrespective of the cause of death, which is made incon-

testable; it is merely the validity of the policy, as an obligation binding upon the company." "The effect of the stipulation in question was not to change the covenants of the contract at the expiration of two years. Those covenants are still the contract of the parties, and the liability of this defendant is that which under the law to such covenants attaches. * * * The question, therefore, is whether an ordinary life policy, containing no applicable special provisions, is a binding contract to insure against a legal execution for crime. Had the policy expressly insured against this risk, that is, that in consideration of the insured paying a certain sum of money, year by year, the company would, in the event of his committing a felony, and being tried, convicted, and executed for that felony, pay to his legal representatives a certain sum of money,—such a contract could not be sustained. * * * Public policy forbids the insertion in the contract of a condition which would tend to induce crime, and as it forbids the introduction of such a stipulation, it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for."

Another case holding similarly is Collins v. Metropolitan Life Ins. Co. (133 Ill. App. 326).

NOTES OF IMPORTANT DECISIONS

INJURY DUE TO HORSEPLAY AS COMPENSABLE.—The Appellate Court of Indiana, in Kokomo Steel & Wire Co. v. Irick, 141 N. E. 796, holds that an employee injured as the result of horseplay with other employee, while on an errand, in the course of his employment, is entitled to compensation under the Workmen's Compensation Act, in view of evidence that horseplay within the factory buildings was so common among the employees as to justify an inference the employer had knowledge of the fact and acquiesced therein.

The general rule as it is stated in the advance sheets of Workmen's Compensation Acts, a Corpus Juris Treatise, p. 79, is that—

"An employee is not entitled to compensation for an injury which was the result of sportive acts of co-employees, or horseplay or skylarking, whether it is instigated by the employee or whether the employee takes no part in it."

"Numerous authorities are cited to sustain the rule, among which is In re Loper, 64 Ind. App. 571, 116 N. E. 324. But in that case an award of compensation to the injured employee was sustained for the reason that the horseplay which was perilous had become a habit of the employees, and that the employers without knowledge of the facts had permitted such acts to continue. In the instant case there is evidence that horseplay within the factory buildings of appellant was common among the employees, so much so, indeed, as to justify an inference by the court that appellant had knowledge of the fact and acquiesced therein. Such being the case, we hold that there was some evidence to sustain the finding of the Industrial Board that the injury involved arose out of the employment within the meaning of the Workmen's Compensation Act."

WIFE'S NEGLIGENCE IN DRIVING HUSBAND'S AUTOMOBILE NOT IMPUTABLE TO HIM.—The case of Oster v. Chicago & A. R Co, 256 S. W. 826, decided by the Kansas City Court of Appeals (Missouri), holds that the wife, using her husband's automobile under his general permission, but without his knowledge, on an errand of her own, in entertaining on her initiative his relatives, is not his agent, and her contributory negligence is not imputed to him.

In this respect the Court said:

"In support of its appeal defendant urges that the trial court committed error in refusing to give a peremptory instruction in its favor. This charge is based on the theory that negligence of the wife may be imputed to the husband, but the testimony in this case fails to show that Mrs. Oster was the agent or servant of her husband in driving the car. On the contrary, the evidence shows clearly, and it is undisputed, that the wife was upon an errand of her own, and not connected with any duty she owed her husband, or their immediate household. Under such state of facts, it frequently has been held in this state that the wife's negligence will not bar recovery by the husband for damages to his car. Spelman v. Delano, 177 Mo. App. 28, 163 S. W. 300; Norton v. Hines, Dir. Gen. (Mo. App.), 245 S. W. 346, and cases there cited. Our Supreme Court, in an exhaustive review of authorities in Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918C, 715, Ann. Cas. 1918, 1127, determined this question against defendant's contention. In a more recent case, Mount v. Naert, 253 S. W. 966, the Supreme Court has declared anew this rule of law. In that case, the plaintiff sued for personal injuries sustained through the

alleged negligence of defendant in using, operating and running an automobile so as to collide with and injure the plaintiff. The trial resulted in the plaintiff taking an involuntary non-suit, and, after motion for new trial was overruled, plaintiff appealed. The evidence showed that Alphonse and Emil Naert were father and son; that the father had a family consisting of a wife and seven children, all living at the home; that the father owned an automobile which was kept in a garage at the family home, and that any and all members of the family who knew how to operate the car did so with the father's acquiescence, if not with his consent, whenever they so desired for their own business or pleasure; that on the night of the injury the son took two of his sisters to a dance, using the family car for that purpose, with the father's consent; that the car was out of repair, and, on that account and on account of the son's negligence in driving the same on a dark night the car ran against plaintiff, and injured her."

REQUIRING DRIVER TO KEEP CLOSE AS POSSIBLE TO RIGHT CURB, NOT REASONABLE REGULATION.—The case of Bennighof-Nolan Co. v. Adcock, 141 N. E. 782, decided by the Indiana Supreme Court, holds that an ordinance making it unlawful to drive on any part of the street except "as near as possible" to the right-hand curb is not a reasonable regulation, under a general grant of power over the streets. The Court, in this respect, said:

"The entire width of a highway is devoted to public travel, and the authority of the city over the streets was conferred in general terms. It was only 'to regulate the use of streets and alleys by vehicles.' Section 8656, subd. 31, Burns' 1914; Acts 1905, c. 129, p. 250, § 53, subd. 31. And the power to enact and enforce 'reasonable traffic and other regulations except as to rates of speed' was preserved by the motor vehicle act, so far as not inconsistent with that act Section 10476d, Burns' 1914; Acts 1913, c. 300, p. 790, § 17.

"But obviously an ordinance which attempted to make it unlawful to drive on any part of the street except 'as near to the curb as possible' on either side would not be a reasonable traffic regulation. Whether the city had power, by ordinance, to require that vehicles be driven 'as near as practicable' to the right-hand curb, is a question not before the court, but we doubt its power to exclude automobiles that keep to the right of the center from traveling near the center of a paved street when not required to turn out to the right side for another vehicle to pass. Section 10476b, Burns' 1914, section 15, c. 300, p. 788, Acts 1913."

SOME CONSTITUTIONAL ASPECTS OF PROHIBITION ENFORCEMENT

By Frederic A. Johnson

When the Constitution of the United States was framed, one of the ablest political thinkers of history, Alexander Hamilton, contended that amendments embodying the principles of the Bill of Rights were unnecessary and even dangerous, because these principles were already protected at common law, and the mere enumeration of them would afford a means to undermine them.[1] Nothing is as alluring, however, as the temptation of adding amendments to what is apparently a complete document. This temptation proved irresistible to the generation who witnessed the adoption of the Constitution. Consequently the prevailing politico-philosophical doctrines of the "Law of Nature" were engrafted on the Constitution to vex future generations under circumstances where these doctrines could have been modified by the Courts to fit changing conditions as they arose, had the discretion of the Judges not been restricted by the rules embodied in the amendments in question.[2] On the other hand, recent amendments to the Constitution, in particular the 18th, have embodied the idea of a generation which is tending more and more to look to the Federal Government for protection where the early generation insisted upon protecting themselves against the government. In view of this reversal, the query of a learned judge as to whether or not certain portions of the Constitution are in conflict with each other deserves investigation.[3]

(1) The Federalist, No. 84.

(2) Wigmore on Evidence, Sec. 2281; The Spirit of the Common Law, Dean Pound, 103 ff.

(3) Falstaff Corp. v. Allen, 278 Fed.*

*278 Fed. 243, 648. Faris, J.: "The Constitution when amended must be construed as a whole. If later amendments destroy, impinge upon, modify or wipe out old provisions, the newer provisions must stand because they are the last utterance of the people, who reserve to themselves the right to change the organic law in the way provided by the organic law itself. Of course, the Constitution when amended, should, if possible, be so construed as to give effect to both the old and the new parts thereof; but if this be impossible, if the new inevitably and unquestionably changes old provisions and destroys antecedent guarantees, the only hope for the situation is an amendment which will restore these rights and guarantees."

Such an investigation is particularly necessary before the question becomes the subject of political controversy as might have resulted recently when Governor Pinchot of Pennsylvania demanded that President Coolidge enforce the 18th Amendment and the Volstead Act throughout the United States. This demand led inevitably to the counter charge that Mr. Pinchot, himself, as Governor, had not enforced these laws in Pennsylvania.[4] In considering whether or not this enforcement had really attained marked success, either in the nation at large or in Pennsylvania, one element was scarcely noticed; the attitude of the courts toward the administration of the laws in question.

The public must realize the importance of judicial decisions in prohibition cases, because the statutes enacted in furtherance of the policy of the 18th Amendment receive practical application in these trials; and to make these statutes effective, convictions are, of course, necessary. To secure convictions the prosecution must introduce incriminating evidence. As a result, the outcome of these trials depends ordinarily upon rulings on questions of the introduction of evidence, because enforcement officials, as a rule, apprehend offenders when the latter are in the very act of breaking the law.[5] Professional detectives, of course, plan to catch criminals at such a time because they know from long experience that moral certainty of guilt is in itself insufficient to secure conviction. Frequently, however, the means, themselves used to secure evidence which will convict are unlawful, violating constitutional rights, especially the guarantee against unreasonable search and seizure,[6] which, in the case of apprehension of offenders of the liquor laws occurs constantly. The Federal Courts, therefore, refused to receive such evidence or set aside convictions which had been obtained as the result of its improper admission.[7] The Pennsylvania State Courts have followed these precedents.[8] [9] [10]

The leading precedents became established[11] at a time when forgers, panderers, get-rich-quick schemers and fraudulent bankrupts obtained their freedom[12] by taking advantage of these constitutional guarantees. The majority of state courts, therefore, do allow the introduction of evidence illegally obtained[13] and there are a considerable number of decisions to the same effect[14] by the Supreme Court of the United States which are now no longer followed. The possibility exists, therefore, that the Supreme Court may return to its previous position because of the agitation for rigorous enforcement of the Volstead Act. The mere fact, however, that the Supreme Court left its former

(4) N. Y. Times, Oct. 29-30, 1923.

(5) Using evidence obtained by illegal Search & Seizure, John H. Wigmore, 8 Am. Bar Ass'n, J. 479.

(6) "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

"The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation subscribed to by the affiant." Constitution of Pennsylvania, Declaration of Rights, Sec. 8.

(7) Weeks v. U. S. 232 U. S. 383; Amos v. U. S. 255 U. S. 213; Gouled v. U. S. 255 U. S. 298; Silverthorne Lumber Co. v. U. S. 251 U. S. 385; U. S. v. Slusser, 270 Fed. 818; Fed. decisions to the same effect in Pa. are: U. S. v. Innelli, 286 Fed. 731; U. S. v. Crossen, 264 Fed. 459; U. S. v. Friedberg, 233 Fed. 313.

(8) Commonwealth v. Kekic, 3 D. & C. 273; 26 Dauphin Co. Reps. 147; Commonwealth v. Eitler, 2 D. & C. 33; Commonwealth v. Polwich, 71 P. L. J. 537; Commonwealth v. Unger, 1923 Luzerne L. J. 295. All of these cases were decided in 1923.

(9) In Commonwealth v. Eitler and in Commonwealth v. Unger, the convictions were affirmed despite the illegality because no motion for a return of the property seized had been reasonably made. The necessity for such a motion is required by the decision in Commonwealth v. Vigliotti, 271 Pa. State 10.

(10) In the Eitler case the evidence was obtained by the use of a valid search warrant. This search warrant, however, had been issued for the seizure of firearms which were not found. The officer found a jug of raisin whiskey. The dicta holding that his whiskey should not have been admitted was therefore contrary to the answer given to the fifth question in the Gouled case, 255 U. S. 312. In other words, the Pa. State Courts show a disposition to be more severe even than is the Supreme Court of the U. S. toward the admission of evidence illegally seized.

(11) Boyd v. U. S., 116 U. S. 616; Weeks v. U. S., 232 U. S. 383.

(12) 8 Am. Bar Ass'n J. 479.

(13) Ibid.; Wigmore on Evidence, Sec. 2183.

(14) Adams v. New York, 192 U. S. 585; Wigmore, Sec. 2184.

position as it did, in effect, in the Weeks Case and later emphasized this departure in Gouled v. United States, and Amos v. United States, shows a determination in the minds of the judges to prevent precedents from becoming established which would have a marked tendency to deprive people of constitutional rights guaranteed in the first eight amendments.[15] Since the Supreme Court has so scrupulously protected reprehensible characters under these constitutional guarantees from illegal measures of Federal Agents, it would tend logically to safeguard still more carefully offenders against the Volstead Act, which is really sumptuary legislation. In Pennsylvania, this effect is reflected in recent state decisions.[16]

The general public should appreciate this attitude because its real character may be lost sight of in the midst of the present campaign for the enforcement of the 18th Amendment. Now despite the jovial skepticism of Mr. Dooley,[17] the justices of the Supreme Court will not cease to take into account the development of constitutional immunities from the common law. These immunities received definite recognition in the opinions of independent judges who sacrificed or risked their offices in resisting the encroachments of the royal prerogative or in condemning as illegal, high handed measures of the representatives of the crown. Thus a number of the latter in seizing the writings of John Wilkes at the behest of a Cabinet officer gave Lord Camden occasion to deliver his famous opinion in the Entick case.[18] This opinion forms the basis for the common law guarantee against search and seizure which has constitutional sanction.[19] The Supreme Court holds that the opinion of Lord Camden establishes an additional doctrine, that against self-incrimination.[20] This doctrine in reality had its origin in the 17th Century, due to the agitation of John Lilburn, who took the initial step to create this privilege by defying the judges of the Star Chamber in their efforts to cross examine him in accordance with the practice of the Ecclesiastical Courts.[21] From the standpoint of history, therefore, the two guarantees are distinct. Further, as a matter of logic, if a man remains passive while real evidence obtained illegally by search or seizure is used against him, he does not testify against himself.[22] Nevertheless, the state courts in Pennsylvania have followed the Supreme Court of the United States.[23] These courts, however, reflect the instincts of the American people[24] and any criticism of the decision must also take into account the circumstance that the Fourth and Fifth Amendments were ratified in the midst of the enthusiastic reception in the United States which

(15) "It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." Gouled v. U. S., 255 U. S. 303.

(16) See Note 8, page 114.

(17) "the coort follows th' iliction rethurns," cited by Dean Pound in his article on "Spurious Interpretation." 7 Col. L. R. 379, 385.

(18) 19 Howell's State Trials, 1029.

(19) Page 114, Note 6.

(20) Boyd v. U. S. (supra); Gouled v. U. S. (supra); Cooley's Constitutional Limitations, 7th Edition, 424-434.

(21) Wigmore on Evidence, Sec. 2250; The Progress of the Law-Evidence, Prof. Chafee, 35 H. L. R. 697.

(22) Ibid.; but see Concerning Searches & Seizures—Osmond K. Fraenkel, 34 H. L. R. 361, 364, and Cooley's Constitutional Limitations (supra); 8 Am. Bar Ass'n Jour., 479, 480; "The Boyd Case (1886) remained unquestioned in its own court for twenty years; meantime receiving frequent disfavor in the State Courts. Then in Adams v. N. Y., 1904, it was virtually repudiated in the Federal Supreme Court, and the orthodox precedents recorded in the State Courts were expressly approved. * * * in 1914—this time moved, not by erroneous history, but by misplaced sentimentality—the Federal Supreme Court in Weeks v. U. S. reverted to the original doctrine of the Boyd Case, but with a condition, viz., that the illegality of the search and seizure should first have been directly litigated and established by a motion, made before trial, for the return of the things seized; so that, after such a motion, and then only, the illegality would be noticed in the main trial and the evidence thus obtained would be excluded. Subsequent rulings attempted to work out this doctrine consistently." In the Gouled case, a government agent seized paper surreptitiously and consequently the defendant's counsel failed to move for its return. When it was introduced at the trial, they objected at once, but the objection was overruled. The Supreme Court, however, held that the ruling admitting evidence illegally seized was merely a matter of procedure (255 U. S. 312), and for that reason should not prevail over a constitutional right. In Commonwealth v. Viggliotti, the Supreme Court of Pa. followed the Weeks case so that the lower courts in this state are bound by this ruling. The judges in the Eitler and Unger cases seemed ready to follow the Gouled case rather than their own court in this respect.

(23) Commonwealth v. Kekic (supra).

(24) 34 H. L. R. 361, 366-367.

greeted the announcement of the French Revolution.[25] The liberal construction, therefore, of these guarantees in favor of the individual, which the view that they overlap more effective, carries out probably the aims of their framers in giving ample protection to the persons accused of crime.[26]

In one class of cases, however, the courts tend to treat with leniency the zealous activity of enforcement officials. These are the cases where offenders have been transporting liquor and are apprehended en route. Of course, the ease with which liquor in considerable volume may be carried by truck or automobile across state boundaries needs no elaboration and the courts do not fail to take judicial notice of this method of law evasion.[27] Besides, as a result of the long legislative contest to control the traffic in intoxicants,[28] the Supreme Court of the United States affirmed with emphasis the power of Congress through its authority over interstate commerce to exclude absolutely from that commerce the shipment of liquor for beverage purposes.[29] Thus, the court pursued its usual tendency toward a broad construction of the commerce clause[30] to a degree that was admittedly exceptional,[31] even under this most elastic of delegated constitutional powers. Years before Congress placed liquor in a category distinct from other articles subject to the laws of interstate commerce, the Courts had occasion to decide cases arising from attempts to evade the high taxes which the government had imposed on liquor during the Civil War. Such evasions were a common practice, especially in Missouri during the early seventies.[32] In one instance of this kind,[33] a distiller had brought whiskey into a bonded warehouse in St. Louis with the intention of evading the taxes. While the whiskey was still in bond, he sold it to an innocent vendee informing him that the taxes were unpaid. The vendee, who suspected no illegality, or, at least, if he suspected it, must have concluded that the distiller had repented—paid the purchase price and the taxes. In reliance on a statute of Congress,[34] which provided that if any attempt were made to evade the payment of taxes on articles that were subject to revenue, the latter were liable to forfeiture,[35] the Federal District Attorney filed an information for the seizure of the goods which were still in the warehouse. Congress had further provided that whiskey was to be placed in bonded warehouses for the purposes of being taxed.[36]

(25) The Court takes judicial notice of this episode in American History in giving the opinion in U. S. v. Inelli (supra); Life of John Marshall Beveridge, Vol. II, p. 4. The pertinent portion of the Fifth Amendment reads: "No person • • • shall be compelled in any criminal case to be a witness against himself."

(26) Weeks v. U. S., 232 U. S. 383, 393: "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of great principles established by years of endeavors and suffering which have resulted in their embodiment in the fundamental law of the land."

(27) Commonwealth v. Schwandal, 71 P. L. J. 529 (July, 1923). "There is a very great difference between proceeding to a man's dwelling house and searching it without a warrant, and searching his automobile without a warrant. • • • If the courts are going to look at the Eighteenth Amendment and the Enforcement Act with the same strictness that they have heretofore displayed with respect to the entering of a dwelling house without warrant, then the courts will assume power to defeat and nullify the practical working of the Eighteenth Amendment and the acts under it. • • • If it were not for the unlawful transportation of liquor by boat and by automobile, the enforcement of prohibition would be a comparatively easy matter. The daily papers are full of accounts of the emptying of vessels filled with liquor which have anchored outside of the three-mile limit by the crews of motor boats who swiftly transport the liquors to our shores, and of the bringing in of vast stocks of liquors from Canada and Mexico by the drivers of automobiles."

(28) The License Cases, 5 How. 504; Bowman v. C. & N. W. Ry. Co., 125 U. S. 465; Leisy v. Hardin, 135 U. S. 100; The Wilson Act, Aug. 8, 1890, 26 Stat. 313; Kansas Gen. Stat. sec. 2543; In re Rahrer, 140 U. S. 545; The Webb-Kenyon Law Act of Mar. 1, 1913, 37 Stat. 699; Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311; The Reed Amendment, Sec. 5, Act of Mar. 3, 1917.

(29) Clark Distilling Co. v. Western Maryland Ry. Co. (supra); U. S. v. Hill, 248 U. S. 420—Automobiles were later decided to be means of transportation in interstate commerce. U. S. v. Simpson, 252 U. S. 465; Williams v. U. S. 255 U. S. 336.

(30) Constitution of the U. S., 1, 8 (3); Gibbons v. Ogden, 9 Wheaton 1; Brown v. Maryland, 12 Wheaton 419; Foster v. Davenport, 22 Howard 244; Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1; Lottery Case, 188 U. S. 321; Wilson v. New, 243 U. S. 332.

(31) Clark v. Western Maryland, 242 U. S. 311, 332; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 164.

(32) John McDonald, "Secrets of the Great Whiskey Ring," p. 64; Rhodes History of the U. S., 2nd Ed., Vol. VII, 246-253.

(33) Henderson's Distilled Spirits, 14 Wall. 44-1871.

(34) Act of July 13, 1866, 14 Stat. 98-173.

(35) Ibid. 151.

(36) Ibid. 155.

A subsequent section[37] provided that if the whiskey were removed from the government warehouse with the intention of defrauding the government there would be a forfeiture. The majority of the Supreme Court, however, held, in spite of a decree for the claimant below, that the dishonest intention of the distiller was enough to place title in the United States and that this vesting of title related back to cut off the rights of the intervening purchaser. The opinion states expressly[38] that this construction was placed upon the sections in question to prevent perpetration of frauds on the government through collusion between the distillers and the officials in charge of the warehouse. The specific sections were held constitutional.[39] The dissenting opinion did not discuss the constitutionality of the statute because they thought the interpretation of the majority inconceivable.[40] As a consequence of the decision, however, a forfeiture results against the innocent purchaser, and, as the dissenting opinion intimates, the government has violated the Due Process clause of the 5th Amendment, if not the guarantees of the 4th. Judge Cooley, in his discussion of the limitations which the 4th Amendment imposes upon the Federal government, cites the Henderson case as an extreme example of governmental interference with commercial affairs.[41] Previous decisions had recognized the right of Congress to impose these forfeitures by statute.[42] Such a statute dispenses with the rules of the common law which do not allow the forfeiture to relate back against the rights of the purchaser.[43] Where previous decisions, however, upheld these forfeitures,[44] an illegal act had actually been committed. In the present case, the purchaser was penalized merely for the dishonest intention of his vendor. While this is an extreme exercise of governmental authority, the judges were influenced,[45] at the time when this case was decided by the knowledge of the practice of dishonest distillers in defrauding the government. In other words, the disposition of the Federal judges[46] foreshadowed the opinion of Chief Justice White in Clark v. Western Maryland Ry. Co. where he sustained the power of Congress to prohibit liquor traffic absolutely, a regulation which would clearly be a violation of the guarantees of the Constitution,[47] for any other article whose manufacture was lawful.

The states had controlled intrastate sales of liquor through their police power[48] long before Congress had exercised full control over commerce in intoxicants which the Constitution has been interpreted to give it. In this exercise of police power, the states had legislated

(37) Ibid. 163.

(38) 14 U. S. 64; See also U. S. v. Singer, 15 Wall. 111, 120.

(39) 14 U. S. 56.

(40) Ibid. 65.

(41) Cooley's Const. Limitations, 7th Ed. 429, Note 1: "* * * the Federal decisions, however, go very far to establish the doctrine that, in matters of revenue, the regulations, Congress sees fit to establish, however unreasonable they may seem, must prevail * * *." The 5th Ed. of Cooley's Constitutional Limitations was published in 1883. The Boyd case was decided three years later and notes made by the Court (see 116 U. S. 625) indicate that they had studied the passages (Cooley's 5th Ed., p. 371, Note 5) maintaining the overlapping of the 4th and 5th Amendments. In a criticism of the policies of Congress in prescribing legislation in Revenue affairs, Cooley cited several cases which the Court, apparently under his influence, overruled (116 U. S. 635). Although the Henderson case was cited—Note 1, p. 429, quoted in part above—as the most extreme example of unwarranted interference in this criticism, the Court takes no notice of it whatsoever, and in a subsequent case affirms it; thus strengthening its already exceptional position. Thacher's Distilled Spirits, 103 U. S. 679; U. S. v. Stowell, 133 U. S. 1, 17.

(42) U. S. v. 1960 Bags of Coffee, 8 Cranch 398; U. S. The Brigantine Mars, 8 Ibid. 417; U. S. v. Grundy, 3 Ibid. 337.

(43) U. S. v. Grundy, Ibid. 350: "Where a forfeiture is given by statute the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately or on the performance of some particular act, as shall be the will of the Legislature. This must depend upon the construction of the statute."

(44) U. S. v. 1960 Bags of Coffee (supra); U. S. v. The Mars (supra).

(45) Note 38, page 117.

(46) Rose's Notes, R. E. Book VII, 749; U. S. v. 3 Tons of Coal, 6 Bissell 377.

(47) 242 U. S. 311, 332: "The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution, but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guarantees such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantee of the Constitution, embrace."

(48) The License Cases, 5 How. 504.

the liquor industry out of existence and they were allowed to do so by the Supreme Court of the United States without making compensation,[49] even where a statute,[50] by prohibiting the manufacture of liquor for beverage purposes containing more than one-half of one per cent of alcohol, had deprived malt manufacturers of an outlet for the disposal of their goods.[51] When a state had once enacted prohibition or adopted a licensing system, it was confronted by a problem similar to the one, though on a much smaller scale, which now confronts the National Administration. Inevitably the courts attempted to cut down the guarantees of purely personal immunities in their own constitutions, which, in most instances were practically identical with the analogous guarantees in the 4th and 5th Amendments.[52] In Maine and Massachusetts, the legislature enacted statutes[53] which permitted an officer to seize intoxicating liquors without a warrant, although after the seizure he was given a short time in which to get one. While these statutes were admittedly in derogation of common law rights, they were sustained by the Supreme Judicial Court of Massachusetts,[54] during the encumbency of Chief Justice Shaw, in the very face of the Massachusetts Bill of Rights. In other states the particularity essential to the traditional form of the common law search warrant has not always been insisted upon.[55] The wide latitude allowed in liquor cases in regard to these fundamental guarantees, which was countenanced by as sound a judge as Chief Justice Shaw, does not mean a lesser respect for constitutional immunities of the citizen than is usually maintaind by Federal judges, but an understanding that the states possess inherent police powers which permit them to exercise greater surveillance over individuals subject to their jurisdiction than is delegated to the Federal government.

Because liquor was an important means of raising revenue, the Federal government instituted a rigid control over this industry during the Civil War. Despite the fact that for this reason the business was in a class by itself,[56] Congress was eventually forbidden to take away from those engaged in it immunities guaranteed by the 4th Amendment.[57] So far as the property interests were concerned, however, it could legislate, under the revenue clause,[58] within its discretion,[59] and the decision in the Henderson case is an example of the extent to which legislation could be carried in making such regulations effective. Without any reference to liquor, when Congress legislates under the war power, it respects the 4th Amendment.[60] The Volstead Act follows the provision of the latter in regard to search and seizure.[61] Whether a more stringent provision would have been declared unconstitutional is doubtful because when the Supreme Court had occasion to consider the validity of the statutes which established National prohibition, under the war power, they relied upon their former decisions sustaining the prohibition laws of Kansas[62] and also sustaining the action of the Mississippi legislature in prescribing a maximum amount of alcohol that was considerably below the intoxicating percentage.[63] These decisions rested on the ground that Congress was

(49) Mugler v. Kansas, 123 U. S. 623, 1887.

(50) Chap. 115—Laws of Mississippi, 1909, Sec. 1, p. 116.

(51) Purity Extract Co. v. Lynch, 226 U. S. 192.

(52) Gen. Stat. of Kansas Ann. 1915, p. 35; R. S. Maine, 1916, p. 17; Sec. 6 provides: "* * * He shall not be compelled to furnish or give evidence against himself * * *." p. 18.

(53) Maine, R. S. 1884, Chap. 27, Sec. 39; Mass. Stat. 1885, Cap. 215, Sec. 13; State v. Bradley, 96 Me. 121; State v. LeClair, 86 Ibid. 522; Weston v. Carr, 71 Ibid. 356; State v. McCann, 59 Ibid. 383; Gray v. Kimball, 42 Ibid. 299, 307; 35 Cyc. 1269; Kent v. Willey, 11 Gray 368; In re Swan, 150 U. S. 637, 649; Kennedy v. Favor, 14 Gray, 200, 202.

(54) Kennedy v. Favor (supra); Mason v. Lothrop, 7 Gray 354; Jones v. Roor, 6 Ibid. 435.

(55) State v. Nejin, 74 So. 103; 140 La. 793; State v. Fitzpatrick, 61 R. I. 54; 11 Atl. 767.

(56) U. S. v. Singer, 15 Wall. 111; U. S. v. 3 Tons of Coal (supra).

(57) Boyd v. U. S. (supra).

(58) Constitution of U. S., 1, 8 (1).

(59) Note 56, page 118.

(60) Espionage Act Title XI, Sec. 3; Fed. Stat. Ann. 1918, page 128.

61) Giles v. U. S. 284 Fed. 208; 34 H. L. R. 380; Fed. Stat. Ann., 1922, p. 560.

(62) Mugler v. Kansas, 123 U. S. 623.

(63) Purity Extract Co. v. Lynch, 226 U. S. 192.

not restricted by the Due Process clause of the 5th Amendment because of the incidents attendant to the exercise of the war power in regard to liquor were the same as those attending the exercise by a state of its police power.[64]

Before the exercise of the war power lapsed by the ratification of the treaty of peace with Germany,[65] the 18th Amendment had gone into effect.[66] It conferred permanently upon the Federal government the same power to deal with intoxicating liquors which had hitherto been exercised and was still retained by the states as part of their police power.[67] Congress besides was authorized to enforce its provisions by appropriate legislation.[68] Previous legislation, either state[69] or federal,[70] not inconsistent with its provisions, remained in force. Now, since the previous legislation of Congress, which still remained applicable, was primarily directed at interstate traffic in intoxicants, the extent of the power given to the President is not easily exaggerated. The monumental decision[71] in which the Supreme Court recognized that the power of the President "to see that the laws are faithfully executed" carried with it implications permitting him to exercise that power over every foot of the United States, is based on Federal control over interstate commerce.[72] In addition, the Federal government has paramount authority to enforce the 18th Amendment.[73]

Since the police power of the states may be exercised incidentally by the national government for that purpose,[74] congressional legislation may conform to those statutes enacted by the states and sustained by their courts as proper methods for preventing violations of the liquor laws.[75] Since the citizens of the states have immunities different from those which they possess as citizens of the United States,[76] in conferring the incidents of police power upon the Federal government by the adoption of the 18th Amendment, they necessarily made their immunities as citizens of the United States, so far as regards the use of liquor, commensurate with the immunities of citizens of those states whose drastic liquor legislation had been sustained under their police powers.[77] In the agitation which has continued for years for national prohibition, the chief sponsors of the 18th Amendment wished to vest in the Federal government the necessary power for its enforcement. The 4th Amendment, especially as the guarantee of self-incrimination in the 5th has been brought to its aid, has proved a stumbling block to their

(64) Ruppert v. Caffey, 251 U. S. 264; Hamilton v. Kentucky Distilleries Co., Ibid. 146, 156: "That the United States lacks the police power and that this was reserved to the States by the Tenth Amendment is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State in its police power or that it may tend to accomplish a similar purpose."

(65) The joint resolution terminating the state of war was passed July 2, 1921. Fed. Stat. Ann. 1921, p. 68.

(66) Jan. 29, 1919; Ibid. 1919, p. 40.

(67) Ex parte Crookshank, 269 Fed. 980, 983; Piel v. Day, 278 Fed. 223; Gloucester Ferry Co. v. Penna., 114 U. S. 196, 215; 29 L. ed. 158, 166; Cooley's Const. Limitations, 7th ed. 856.

(68) Fed. Stat. Ann. Sup. 1921, p. 839; Ex parte Crookshank (supra), 986; Ex parte Virginia, 100 U. S. 339, 347.

(69) Com. v. Vigliotti, 271 Pa. 10; affirmed, 258 U. S. 403; State v. Ceriani, 113 Atl. 316, 318; Com. v. Nickerson, 236 Mass. 281; 128 N. E. 273; 10 A. L. R. 1568.

(70) Lipke v. Lederer, 42 S. C. Rep. 549, 550; 259 U. S. 557, 561; Abbate v. U. S. 270 Fed. 735; Koppitz v. U. S., 272 Fed. 96.

(71) In re Debs, U. S. 564, 578: 'We hold it to be an incontrovertible principle, that the government of the U. S. may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it."

"Our Chief Magistrate and His Powers," W. H. Taft, Columbia Univ. Press, 1916: "The widest power and the broadest duty which the President has is conferred and imposed by a clause in Section 3 of Article II (of the Constitution), providing that 'he shall take care that the laws be faithfully executed.' "

(72) In re Debs (supra), p. 582: "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce * * *."

(73) National Prohibition Cases, 253 U. S. 350.

(74) Ruppert v. Caffey (supra); Hamilton v. Distilling Co. (supra); Falstaff Corp. v. Allen (supra); Ex parte Crookshank, 269 Fed. 980, 983; Piel v. Day, 278 Fed. 223; Gloucester Ferry Co. v. Pa., 114 U. S. 196, 215; 29 L. ed. 158, 166; Cooley's Const. Lim. 7th ed. 856; American Gov. and Politics, 16, No. 3, The Am. Political Sc. Review, 432. 436—Nathan Isaacs; Hoke. v. U. S. 227 308.

(75) Ex parte Crookshank (supra); Piel v. Day, 278 Fed. 223.

(76) Twinning v. New Jersey, 211 U. S. 78.

(77) Piel v. Day (supra).

purpose, just as did similar provisions in the state constitutions.[78]

The police power of the states was never restricted by the first eight amendments to the Federal Constitution,[79] nor by the 14th Amendment.[80] Police power, besides, had long been recognized as the source of a legislature's authority to deal with commerce in liquor when the Constitution was ratified.[81] Therefore, even despite the fact that the framers of the Constitution had no definite sentiments against strong drink,[82] since the Constitution did not take away from the states the police power which controlled commerce in liquor, liquor remained the subject of police legislation.[83] The individual who possessed liquor in defiance of the law was usually allowed immunity, however, from invasion of purely personal rights.[84] The increase of sentiment in favor of prohibition in the several states which began in the middle of the 19th century received an occasional setback in the beginning from the courts, who declared state wide prohibition acts void, as a violation of the due process clause of the state constitution.[85] This obstacle did not, however, remain long in the states even before 1886,[86] when the Supreme Court in Mugler v. Kansas,[87] despite the arguments of distinguished counsel, placed all those engaged in the liquor business in the danger of being deprived of their occupations and means of sustenance by a mere majority in the legislature or in a state-wide referendum. Consequently when the 18th Amendment was framed, care was taken to allow existing prohibition legislation in the states to remain in force despite the paramount authority which was necessarily vested in the Federal Government, as a result of ratification of the Amendment. In other words, by the permission to exercise "concurrent power"[88] the states retain unimpaired the inherent police power to restrict the manufacture, sale, and transportation of intoxicants which they had enjoyed before.[89] Since "concurrent" connotes a "like" power, it is this police power of the states which was thereby transferred to the Federal government.[90] In short, each state together

(78) Cooley, Ibid. 850: "And it is only where, in framing such legislation, care has not been taken to observe those principles of protection which surround the persons and dwellings of individuals, securing them against unreasonable searches and seizures, and giving them a right to trial before condemnation, that the courts have felt at liberty to declare that it exceeded the proper province of police regulation."

(79) Twinning v. New Jersey, 211 U. S. 78; Barbier v. Connolly, 133 U. S. 27, 31.

(80) Ibid.; See also Slaughterhouse Cases, 16 Wall. 36; 21 L. ed. 394.

(81) Paul v. Gloucester County, 50 N. J. L. 585, 595; 15 Atl. 272, 277; 1 L. R. A. 86, 90: "The sale of intoxicating liquor has, from 'the earliest history of our state, been dealt with by legislation in an exceptional way. It is a subject by itself, to the treatment of which all the analogies of the law, appropriate to other topics, cannot be applied." As early as 1667, possibly before, the courts recognized that the traffic in liquor was the subject of police regulation. Player v. Jenkins, Sinderfin, 284.

(82) Knickerbocker Ice Co. v. Stewart (supra), 169, Holmes, J.: "I cannot for a moment believe that apart from the 18th Amendment special constitutional principles exist against strong drink. The fathers of the Constitution so far as I know approved it."

(83) License Cases (supra); Cooley 7th Ed. 849: "Perhaps there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital being employed in it being fully protected by law, the legislature then steps in, and by an enactment, based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand." See also Freund, Police Power, Sec. 540.

(84) Mechemeier v. State , 11 Ind. 484; Hibbard v. People, 11 Ind. 484; but see Kennedy v. Favor, 14 Gray 200.

(85) Wynehamer v. People, 13 N. Y. 378.

(86) People v. Fritzche, 183 N. Y. S. 641, 462.

(87) 123 U. S. 623.

(88) 18th Amdt., Sec. 2.

(89) See ante, p. 119, Note 69.

(90) Com. v. Nickerson, 236 Mass. 292; 128 N. E. 277; 10 A. L. R. 1576: "The words of the amendment declare a complete possession of power by the states, of which they cannot be deprived by Congress. The force and effect of the words of the 18th Amendment, while possibly enlarging the permissible scope of state legislation respecting importation and exportation of intoxicating liquors, leave open to state legislation the same field heretofore existing for the exercise of the police power concerning intoxicating liquors, subject only to the limitations arising from the conferring of like power upon Congress with its accompanying implications, whatever they may be."

Ex parte Crookshank, 269 Fed. 980, 983: "Previous to the adoption of that Amendment (the 18th) it was the established law that the several states possessed the amplest authority, under the police power, to regulate and even absolutely prohibit the liquor traffic in any of its various forms or occurrences (citing Mugler v. Kansas and Purity Extract Co. v. Lynch, supra). It may not, I think, be maintained with success that in the adoption and ratification of the 18th Amendment the several states were surrendering any of the powers theretofore possessed by them, respecting their own jurisdiction to prescribe effective prohibition of that traffic. In all that was done, they were simply conferring upon the Federal government the like power to prohibit, which theretofore, in virtue of its organization and the character of the

with the government exercises the same power to deal with intoxicants which hitherto belonged to the states alone.[91] Since the states were not hampered by the 4th or the 5th Amendments in enforcing prohibition,[92] it should logically follow that the National government should likewise be unrestricted in so far as the enforcement of the 18th Amendment and the Volstead Act are concerned.

According to recent decisions, based on Section 26, Title 2, of the National Prohibition act,[93] liquor illegally possessed may be seized on mere suspicion and without a warrant by Federal agents, even though on the premises of the possessor.[94] While the courts will not allow this liquor to be used in evidence,[95] they will not return it, because illegally held liquor is government property.[96] Even though this may not give the government agents the right to enter a man's house and seize the liquor under all circumstances,[97] once the government is in possession, however, by fair means or foul, the courts will not permit its return to the owner.[98] Thus, the policy of the 4th Amendment to keep the home free from the intrusion of governmental officers is not respected, except where the government fails to show that the liquor is illegally held by the possessor.[99] Since an illegal search is not justified by what is found,[100] there seems to be no reason why the seizure resulting from such a search should give to the government the right to keep the liquor for the purpose of destroying it, when it cannot be introduced in evidence.[101] In short, the decisions approving and following the Henderson case have left nothing of the 4th Amendment where liquor is concerned.[102] The only remedy, therefore, which the individual has for the invasion of his home is the original one of an action for damages against the offending officials.[103]

Frequently, however, the object of the government is to seize and destroy the liquor quite as much as to arrest the offenders. With this practice in mind, when we regard the development of the 4th Amendment from its American sources, we find that the purpose of the historic Writs of Assistance was rather to seize contraband, to prevent its use in enemy trade, than to make use of it for evidence;[104] to prevent such general seiz-

powers reserved to the states, it had not possessed (citing Hamilton v. Distilling Co., supra). In other words, there was a surrendering by the states of the power to permit the liquor traffic, but no dimunition of their power to prohibit it; they accorded to the Federal government the jurisdiction to enforce absolute prohibition of the traffic (citing Ruppert v. Caffey and Rhode Island v. Palmer,* supra), but they still retained the same right to themselves (citing Com. v. Nickerson, supra).

*This is one of the National Prohibition Cases (supra). The Court said there in conclusion 9: "The power confided to Congress by that section (18th Amendment, Sec. 2) while not exclusive, is territorially co-extensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states, or any of them."

U. S. v. McCann, 281 Fed. 880, 882: "Before the adoption of the 18th Amendment, the states alone could regulate the intrastate traffic in intoxicating liquors, and Congress alone could regulate interstate traffic. The effect of the amendment was to give Congress jurisdiction concurrent with the states to regulate intrastate traffic." See also Jones v. Cutting, 238 Mass. 218; 130 N. E. 271. Compare the statements of Representative Volstead made in the House of Representatives on March 23, 1920, Congressional Record, Vol. 59, part 9, p. 8937. His speech is cited with approval in so far as it relates to the interpretation of "concurrent power" by Rugg, C. J., in Com. v. Nickerson (supra).

(91) Opinion of the Justices, 239 Mass. 611.

(92) Barbier v. Connolly, 113 U. S. 27, 31: "But neither the Amendment (the 14th)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

(93) 41 Stat. 305.

(94) U. S. v. Alexander, 278 Fed. 308; O'Connor v. Potter, 276 Fed. 32.

(95) Note 94.

(96) U. S. v. Fenton, 268 Fed. 221; U. S. v. Bateman, 278 Fed. 238.

(97) Boyd v. U. S., 286 Fed. 930: "There is high authority for the proposition that the person in possession of forfeited property has no right to the protection of his possession, and that the property is always rightfully subject to seizure on behalf of the government."

(98) Note 94.

(99) U. S. v. Mattingly, 285 Fed. 922.

(100) U. S. v. Slusser (supra).

(101) U. S. v. Fenton, 268 Fed. 221, 222: "An unlawful arrest of an offender does not work a pardon in his behalf, and seizure without process and by force of government property, of which it is entitled to immediate possession, does not entitle the offender to a return of the property, nor to exclusion of its use in evidence against him." It is submitted that this opinion reaches the logical result required by 41 Stat. 305.

(102) U. S. v. Stowell (supra); Thacher's Distilled Spirits (supra); Boyd v. U. S. 286 Fed. 930; compare U. S. v. Mattingly (supra); U. S. v. Slusser (supra).

(103) Entick v. Carrington (supra).

(104) Tudor's Life of Otis, p. 67; Lecky's Hist. of England in the 18th Century, vol. 3, pp. 266, 281, 295 and ff.

ures, especially when made without a warrant and on mere suspicion, the 4th Amendment was framed. From the history of the origin of this Amendment from English sources we find that immediately before the American Revolution the object of the general warrant was to secure evidence.[105] Where the evidence was illegally obtained the English courts allowed its introduction, leaving the person whose privacy had been invaded the right to an action for damages.[106] Today such action is rarely used in the United States where the private individual, although a wrong-doer, is in reality protected by the guarantee against self-incrimination, embodied in the 5th Amendment, as that guarantee has been construed to overlap the 4th Amendment.

The instinct of the American people can scarcely favor the overlapping of these two Amendments in the case of illicitly distilled liquor, when for years the title to it vested in the government under revenue statutes,[107] and the officials who enforced these laws were universally known to be required to use every means and method to seize moonshine whiskey. Besides, the policy of the doctrine against self-incrimination finds its chief support, in the spur it puts to the police officials to bring back incriminating evidence before a suspect is arraigned before judge and prosecutor.[108] With the evidence at hand the practice of extracting the truth from the witness, as practiced in France by forcing him to testify, is unnecessary.[109] Should the prohibition violations increase and the courts insist upon excluding illegally obtaind evidence, the police officials will revive the third degree practice in liquor cases and seek less real evidence, and thus actually defeat the purpose of the 5th Amendment.

Even now evidence obtained without the participation of Federal officials is admissible, in the United States Courts, despite the illegality of the means used to secure it.[110] The fact that the states have concurrent power to enforce the 18th Amendment does not make their officials agents of the National government in obtaining evidence. Therefore, these officials may secure evidence illegally without having it excluded in the Federal courts.[111] In other words, despite the decisions in Gouled v. U. S.[112] and Amos v. U S.,[113] the 4th and 5th Amendments may be evaded in the enforcement of the 18th. Unless the Supreme Court, therefore, wishes to carry its traditions of liberal construction of the 4th Amendment as it has been combined with the 5th, in favor of the individual, to the breaking point at a time when law enforcement is of great enforcement, the Amendment will, in effect, be nullified. The Court should, therefore, recognize frankly that the 4th Amendment is inconsistent with the 18th, and, in view of the efforts of the authors of that Amendment to make prohibition effective and of the history of liquor legislation, is repealed by it so far as liquor cases are concerned by implication.

The guarantee against unreasonable search and seizure still exists, however, as part of the common law,[114] even though constitutional action is taken away, and, unless that were expressly abrogated by statute, would not be subject to invasion. The Courts, therefore, would not tolerate invasions unless expressly authorized to

(105) The Opposition Under George III, W. F. Rae, London, 1874, p. 39. A Complete Collection of the Genuine Papers, Letters, etc., in The Case of John Wilkes, Esq., see pp. 33, 34 for the letter from Wilkes to Egremont & Halifax, charging robbery of his house in his absence and the retention of his goods by the ministers in question. Their reply is in part as follows: "We are at a loss what you mean by stolen goods; but such of your papers as do not lead to a proof of your guilt, shall be restored to you; such as are necessary for that purpose, it was our duty to deliver over to those, whose office it is to collect the evidence, and manage the prosecution against you." The letter is dated May 7, 1763, see p. 35 of the work cited above. On page 239 there is printed an affidavit by one George Kearsly, of London, asserting that Wilkes could never have been found guilty, either in the House of Lords or in the King's Bench, had the evidence in question not been introduced. The collection in question was published in Berlin in 1769.

(106) 8 Amer. Bar Ass'n, J. 479, 481; Wigmore on Evidence, Sec. 2183.

(107) Thacher's Distilled Spirits (supra); Stowell (supra).

(108) Wigmore on Evidence, Sec. 2251.

(109) Wigmore on Evidence, Sec. 2251.

(110) Burdeau v. McDonald, 256 U. S. 465.

(111) Kanellos v. U. S., 282 Fed. 461; Kirkley v. U. S., 283 Fed. 34; Epstein v. U. S., 284 Fed. 567. These cases were decided in the 4th Circuit, C. C. A.

(112) 255 U. S. 298.

(113) 255 U. S. 313.

(114) The Federalist, No. 84.

do so by the legislature,[115] and an American legislature, many of whose members are lawyers, would scarcely destroy the immunity guaranteed to a man in his dwelling.[116] A recognition of the repeal pro tanto of the 4th Amendment by implication—and of the guarantee against self-incrimination in the 5th as it has been construed to reinforce the 4th—would allow the courts to admit evidence illegally obtained by Federal agents to secure convictions under the Volstead Act. The offending official, however, would remain liable to criminal prosecution and, at the same time, the injured party could institute a civil action against him for damages. Such a possibility would discourage outrageous invasions of the home or dragnet seizures of vehicles. If the court decides that the 4th Amendment has actually been repealed, where enforcement of the Volstead Act is concerned, the wide publicity which would be given to this opinion would apprise the citizen of his rights. With the consciousness of that knowledge, enforcement officials would tend to exercise even greater caution than they do now to avoid violating these rights. The danger exists that if the Supreme Court does not recognize the fact of this repeal, the Federal and State authorities in tacit agreement will nevertheless commit illegalities against individuals who know little of constitutional guarantees and circumvent the courts; and the host of decisions constantly arising under the Volstead Act[117] will serve as precedents by which the guarantees in question will be permanently undermined for all purposes.

(115) Commonwealth v. Polwich, 71 P. L. J. 537, 538: "* * * Stewart, P. J., in interpreting the Pa. Prohibition Enforcement Law, Laws of Pa., March 27, 1923, said: '* * * we have no right to assume that because private dwellings may be used for the manufacture of liquor, that therefore, we can extend the provisions of this act to cover something that is not found in the act itself.'"

(116) The learned judge had previously said: "We find nothing in the act of assembly that would justify a search of a private dwelling from the mere possession of such articles."

(117) See page 122, Note 111, Epstein v. U. S. was decided in accordance with the precedent established by Kanellos v. U. S. and Kirkley v. U. S. Both of these earlier cases resulted from indictments under the Volstead Act. The Epstein Case involved a prosecution under the Harrison Anti-Narcotic Act.

NEGLIGENCE—INJURIOUS HAIR DYE

CAHILL v. INECTO

203 N. Y. S. 1

(Supreme Court, Appellate Div. Feb. 8, 1924)

Evidence that, on the recommendation of a hair dresser, plaintiff, a woman in perfect health, caused a hair dye, manufactured by defendant and represented by defendant to be harmless, to be applied to her head in accordance with the directions, and as a consequence suffered great pain and mental suffering, and her skin became marred and blemished, held to sustain a judgment for plaintiff.

DOWLING, J. This action was brought to recover damages for personal injuries sustained by plaintiff by reason of the applications to plaintiff's head of a hair dye manufactured by defendant, known as "Inecto Rapid," which it advertises and represents to the general public as suitable for use as a hair dye and for application to the head as such. It is alleged in the complaint that, by reason of the carelessness, recklessness, and negligence of the defendant herein, the said "Inecto Rapid" was inherently dangerous to the skin, and if applied thereto would cause rashes, burnings, itches, and other physical pains, and would otherwise mar and blemish the skin of the person using the same. It is further alleged that plaintiff, relying on the representation of defendant that said preparation was suitable for use as a hair dye, caused the same to be applied to her head, whereupon she—

"suffered the rashes, burnings, itches and other physical pains, and mental sufferings, and her skin became marred and blemished, and by reason thereof the plaintiff was and still is unable to attend to her regular course of duties, and was compelled to and did, and will further be compelled to, incur expenses of an assistant in the performance of her household duties, which plaintiff had theretofore performed, and was compelled to and did undergo expenses in an effort to be cured of such injuries, and upon information and belief that such injuries are of a permanent nature."

It is further set forth that:

"The foregoing injuries were caused solely and exclusively by reason of the carelessness, recklessness, and negligence of the defendant, and without any negligence on the part of the plaintiff contributing thereto."

The proof shows that plaintiff called upon a hair dresser for the purpose of having her hair

dyed; that the hair dresser recommended to her a dye which she had bought from defendant, at its establishment, called "Inecto Rapid," composed of two bottles which she applied to plaintiff's hair according to the directions accompanying the same. She followed the instructions, and used in all four bottles, two each marked A and B, one of which is the dye, the other some preparation of peroxide, to fix the dye. The directions for use furnished by defendant are that the contents of bottle A is to be poured into a glass or porcelain saucer first, then those of bottle B, and the whole mass is to be mixed together. There is no claim that the hair dresser did not follow the directions, or that she improperly applied the dye. The application began at 2 p. m. and was completed in an hour or an hour and a half. About 9 o'clock on the same evening, plaintiff's head began to itch, and the following day the itching increased, and towards evening her face began to swell. The pain traveled down both sides of her face as far as her chest. The following day she called on her physician, who prescribed a salve for her head and a lotion for her face, but the swelling continued to increase very rapidly for a week, so that her eyes could not be opened. She was confined to a darkened room for five weeks, for four of which she could not lie down. Ulcers formed, accompanied by constant burning, and finally her hair and eyebrows fell out, being practically burned off.

Plaintiff testified that she had never suffered from any skin or scalp disease or trouble in all her life. The hair dresser testified that plaintiff's head was not ulcerated or swollen when she applied the dye. Plaintiff's physician testified that she was perfectly well before she had her hair dyed; that his diagnosis verified that fact, and that her ailments were the result of the application of the dye; that there could be no other cause for the condition he found, save the application externally of a chemical agent.

The defendant produced hair dressers, who had used the dye in their business without injurious result, and two physicians, whose testimony did not aid its case; the purpose in calling them being apparently to prove that plaintiff had some predisposition or idiosyncrasy, making her susceptible to hair dye, but they absolutely failed to make such proof.

The pamphlet issued by defendant, advertising its "Inecto Rapid," contains no warning of any kind that its use is dangerous. On the contrary, it sets forth that it is—

"positively safe for use on all healthy skins, but not for use with sores, eczema, or predisposition to skin eruption. When in doubt, apply test recommended by Drs. Sabouraua & Rousseau, supplied gratis on application."

For aught that appears, it may be used by anyone, and does not require the services of a professional hair dresser to apply it, for the same pamphlet states:

"That it is 'indorsed and recommended by 15,000 royal court, and leading continental hair dressers; has received over 20,000 unsolicited letters of praise from users in all parts of Europe; requires no cleaning or washing of hair before application; is easy to apply; needs no drying; gives always the results you desire when used in accordance with directions'; and further that 'these simple instructions, if carefully followed, will insure you the same success and satisfaction that are being enjoyed by thousands of women in Europe today.'"

We have, then, a case of a woman, in perfect health, who goes to a hair dresser to have her hair dyed. The latter recommends defendant's preparation, which she has bought from it, and which she applies exactly as directed by the defendant's printed instructions. This preparation, defendant represents to be absolutely harmless, except under conditions not here present. Plaintiff then suffers painful and serious injuries as the direct result of the dye thus applied, which her physician testifies in effect, is the competent producing cause of those injuries, and the sole possible one. This, in my opinion, made out a sufficient prima facie case for plaintiff, and adequately sustained the burden of proof she had to assume.

It was then the defendant's duty to at least meet this proof by adequate explanation of how the injuries were in fact received. It completely failed to show that plaintiff had any of the physical conditions which made the use of the dye inadvisable for her. It could then have gone further, and shown directly, by some one in its employ or by a chemist, that its preparation contained no chemical or other agent by which plaintiff's injuries could possibly have been occasioned. But it carefully refrained from attempting to make any such proof. It produced five hair dressers, who had used the dye on customers without injury. It produced two physicians whose testimony proved nothing. Its only other witness was an employee, who testified that the preparation was made in ten-gallon quantities in one large vat; that it was then put into smaller containers and then into small bottles through rubber tubes; and who further testified that

a million and a half of the small bottles had been sold in the past two years. But this witness knew nothing of the composition of the dye, nor of its ingredients. The proof of the non-harmful character of the ingredients used in this dye was solely within defendant's control. Such proof was required to be made by it, if it hoped to meet plaintiff's case. Not having attempted to do so, it is difficult to see how the jury could have found otherwise than for plaintiff.

The judgment and order appealed from should be affirmed, with costs. Order filed. All concur.

NOTE—*Liability for Injuries Caused by Hair Dye.*—The case of George v. Skivington (1869), L. R. 5 Exch. (Eng.) 1, holds the seller of a hair wash liable for personal injuries due to its use, on account of unskillfulness or negligence in its manufacture. In this case the seller was also the manufacturer or compounder of the wash.

In Armstrong Packing Co. v. Clem, Tex. Civ. App., 151 S. W. 576, 17 A. L. R. 704, a case somewhat analogous to the reported case, it was held that evidence that a manufacturer of soap placed the same upon the market with knowledge that poisonous and injurious substances were necessary in its preparation, and that if too much of the poisonous ingredients was used, and not neutralized in manufacturing, injury was liable to result from its use, and did in fact result, sufficiently showed negligence in its manufacture which rendered it liable to one who purchased from a retail dealer, for injuries which resulted from its use.

ITEMS OF PROFESSIONAL INTEREST

SWEDEN TO GREET INTERNATIONAL BAR ON SEPTEMBER 8

Announcement of the plans for the thirty-third conference of the International Law Association of which the Earl of Reading, Viceroy of India, is President, to be held in Stockholm, beginning September 8 next, was made recently at the annual meeting of the American branch of the association at the University Club. The conference at Stockholm is to be held after the meeting of the American Bar Association in London in order that many American lawyers who are members of the International Law Association may attend. The Government of Sweden has made elaborate preparations to entertain the visiting lawyers.

The Stockholm conference will receive reports from special committees in various countries who have been working on a new code of international law, but one of the most important subjects to be considered is the subject of the protection of minorities under the League of Nations and the Statute of Permanent International Criminal Court. Reports will be received from the committees of neutrality, foreign judgments, systems of evidence, aviation, international organization, codification, nationality and commercial arbitration.

The idea of an American Branch originated with David Dudley Field, draftsman of the civil code of New York State, and Elihu Burrit. Chief Justice Taft of the United States Supreme Court, was elected Honorary President of the American branch at the recent meeting and Amos J. Peaslee succeeded Dr. Arthur K. Kuhn as Honorary Secretary.

Former Supreme Court Justice Harrington Putnam was elected President. The other new officers are: Vice-President, Sir Robert Borden, of Ottawa, Canada; Dr. Charles Noble Gregory, of Washington, D. C.; Everett P. Wheeler, John W. Davis and Dr. Arthur K. Kuhn, of New York; Treasurer, Ira H. Brainerd, of New York, and Chairman of the Executive Committee, Edwin R. Keedy, of Philadelphia.

BOOK REVIEWS

WAR FINANCES IN THE NETHERLANDS

The book as above entitled is published by the Oxford University Press, American Branch, New York, and is one of the publications of the Carnegie Endowment for International Peace. It is by M. J. Van Der Flier, LL.B. The book, in addition to general information concerning the Netherlands, covers the subject of war finances in the Netherlands up to 1918.

EIGHT GREAT AMERICAN LAWYERS

Mr. Horace H. Hagan, A. M., LL.B. of the Tulsa Bar, formerly Assistant Attorney-General of Oklahoma, is the author of an attractive volume entitled as above. The lawyers about whom Mr. Hagan writes are Luther Martin, William Pinkney, William Wirt, Thomas Addis Emmet, Seargent Prentiss, Rufus Choate, Judah P. Benjamin and William M. Evarts. The subjects of the author's discourse are well chosen and the work is excellently done. It should be highly interesting to all lawyers, and it is instructive historically as well as biographically. The book consists of two hundred and ninety-three pages, is bound in red silk, and is published by Harlow Publishing Company, Oklahoma City.

DIGEST.

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Automobiles**—Agency.—One who sold cars on commission and was obliged to own and maintain a car at his own expense, for demonstration purposes, held an "independent contractor" (the principal distinguishing characteristic of which relation is freedom from control as to the manner in which the details of the work is to be done), for whose negligence the one for whom he sold was not liable.—James v. Tobin-Sutton Co., Wis., 195 N. W. 848.

2.——Agency.—Evidence held to make question for jury as to whether one employed as salesman in a store and also on the road and who, after attending a ball game, was driving his employer's automobile to the home of one with whom he had left a phonograph on trial, was acting within the scope of his employment at the time of a collision, and to support its finding for plaintiff.—Good v. Berrie, Me., 122 Atl. 630.

3.——Chargeable With Negligence.—Where defendant, on seeing plaintiff's car, pulled over to the left side of the road, he was not chargeable with negligence because of an error in the exercise of judgment, when confronted with sudden danger.—Larson v. Long, Colo., 219 Pac. 1066.

4.——Guests.—A guest, upon premises or in the vehicle of another, must take such premises or vehicle as he finds them, and the owner is not liable for injuries, provided he does not fail to inform or warn of that which must be considered a trap or concealed defect, or by no act of his creates a new danger.—Mitchell v. Raymond, Wis., 195 N. W. 855.

5.——Negligence Per Se.—One struck by defendant's automobile while standing near a car, from which he had stepped, held not as a matter of law on an unsafe part of the highway or negligent per se in being where he was.—Smith v Spirek, Iowa, 195 N. W. 736.

6.——Plaintiff Law Violator.—The rule established in this state is that where one who is unlawfully traveling on a highway, as in an automobile which has never been registered under the statute and without a driver's license, in violation of the statute, is injured by the negligence of another he may recover for his injuries, unless his violation of the law contributes to the accident or is its proximate cause.—Muller v. West Jersey & S. R. Co., N. J., 122 Atl. 693.

7.——Scope of Employment.—Where defendant's employee, during the lunch hour, used defendant's motor truck, in going to his home for lunch, and on returning injured plaintiff, held that the truck was not used by the employee within the scope of his employment, or in his master's business, even if the employer had consented to such use.—Bloom v. Krueger, Wis., 195 N. W. 851.

8.——Third Persons.—The owner of an auto is not liable for the negligent operation by a third person, not a member of the family, if he was in the wrongful possession thereof or driving it solely for his own pleasure or convenience.—Napier v. Patterson, Iowa, 196 N. W. 73.

9. **Bankruptcy**—Liens.—Under the law of Mississippi by which an execution creditor takes property subject to all valid liens thereon good against the debtor when the judgment was rendered, a trustee in bankruptcy takes subject to a mechanic's lien, which, under Code Miss. 1906, § 3058, takes effect from the date of the contract without recording except as to purchasers or incumbrances for value without notice.—In re Purvis, U. S. D. C., 293 Fed. 102.

10.——Stockholder's Claim.—A stockholder in a bankrupt corporation held entitled to prove claim as a creditor for an amount due him on settlement of a partnership, which the corporation succeeded, which claim, with other liabilities of the partnership, it was understood the corporation should pay as part of the purchase price of the partnership assets.—In re Stone-Moore-West Co., U. S. D. C., 292 Fed. 1004.

11.——Suits For Accounting.—The taking of testimony in a suit in a state court, commenced before filing of petition in bankruptcy, seeking an accounting of collections charged to have been made by the alleged bankrupt of hypothecated choses in action, and misapplied by it and its codefendant in such suit, will not be restrained until the issue of insolvency of bankrupt can be adjudicated in the bankruptcy proceeding.—In re Malsby Machinery Co., U. S. D. C., 292 Fed. 1008.

12.——Wages.—Rev. St. § 3466 (Comp. St. § 6372), giving claims of the United States priority over all other claims, must be construed in pari materia with Bankruptcy Act, § 64B (Comp. St. § 9648), under which wages earned within three months before filing of petition in bankruptcy, not exceeding $300 to each claimant, were properly given plority over income taxes due the United States.—In re Enterprise Brass Foundry, U. S. D. C., 292 Fed. 69.

13. **Banks and Banking**—Acceptance of Checks.—Where plaintiff sought to hold defendant bank liable on its acceptance of checks drawn by a codefendant, under Uniform Negotiable Instrument Act, §§ 132, 135, 185, 189 (Vernon's Ann. Civ. St. Supp. 1922, arts. 6001—132, 6001—135, 6001—185, 6001—189), petition should have alleged that checks had been accepted in writing either after execution or by an unconditional promise in writing to accept same before actually drawn.—First State Bank v. Sanford, Tex., 255 S. W. 644.

14.——Collecting Bank.—Whether defendant bank was an agent for collection, with a special agreement that collection should be made through a named bank, or merely an agent for transmission of a sight draft and bill of lading to that bank, held immaterial, as negligent failure to do either would render defendant liable.—Fitelson v. State Bank, N. Y., 201 N. Y. S. 737.

15.——Consolidation.—A written agreement by officers of a state bank to sell its entire capital stock to the officers of a rival state bank does not necessarily imply a contract to consolidate the two banks, even where the sellers in their contract guarantee the assets transferred with the capital stock sold.—Cooper v. Home State Bank, Neb., 196 N. W. 119.

16.——Deposit For Special Purpose.—Lien of garnishment on bank deposit is subordinate to special agreement of depositor and bank that it will be paid out only for a special purpose.—Iowa Mut. Liability Ins. Co. v. De La Hunt, Iowa, 196 N. W. 17.

17.——Deposits.—Where a bank deposit was made under agreement that it should "be payable to the undersigned jointly or severally and to or upon the order of either of the undersigned whether the other be living or not" and that it was "payable to and upon the joint and several orders of the undersigned or either of them or the survivor of them," in an action to determine ownership of the deposit as between the executor of one joint depositor and the other, the exclusive possession of the passbook by the deceased depositor was immaterial.—Illinois Trust & Savings Bank v. Van Vlack, Ill., 141 N. E. 546.

18.——Deposits.—Where a bank, receiving a deposit from a live stock company, knew that it represented proceeds of a sale of a live stock on a commission basis, and belonged to the company's customers, the bank's application of the money to the company's indebtedness to the bank was illegal, and the company's customers could have recovered the money from the bank.—Drovers' Nat. Bank v. Denver Live Stock Exchange, Colo., 220 Pac. 402.

19.——Shareholders.—Liability of shareholders of an insolvent national bank for plaintiff's loan to the bank when it was in embarrassed circumstances could not be escaped on the theory that the debt sought to be enforced was created during the process of liquidation, where, when the loan was made, the bank was in active operation and remained so for a short period thereafter, and was not then pronounced or thought to be insolvent, and the process of liquidation under the statute did not begin until 50 days after the contract was made.—Hightower v. American Nat. Bank of Macon, U. S. S. C., 44 Sup. Ct. 123.

20. **Carriers**—Freight Tariff.—A shipment of coal by a furnace company from its mines to T., where its furnace was located, from which point it was reconsigned to its ore mines at the local rate, was not a shipment of furnace material consigned to T. "to and for the use of pig iron furnace companies" located at T., within the meaning of a tariff providing for a low rate of 50 cents per ton for shipments of furnace coal to T., and the railroad was therefore entitled to recover the difference between the low rate paid and the general tariff of 70 cents a ton.—Republic Iron & Steel Co. v. Davis, Ala., 98 So. 197.

21.——Parking Space.—A railroad company in providing parking space for vehicles on its own ground, for those who may solicit trade or patronage, may prefer one transportation or hotel company as against all others.—Kenyon Hotel Co. v. Oregon Short Line R. Co., Utah, 220 Pac. 382.

22. **Chattel Mortgages**—Crops.—To create a specific mortgage lien on crops such as will prevail against third persons subsequently acquiring a specific interest therein, the crops must be the contemplated product of the land in which the mortgagor had at the time a definite present interest as distinguished from a mere possible or expectant future interest.—Windham v. Wilson, Ala., 98 So. 15.

23. **Commerce** — Discriminating Statute.—Rem. Comp. Stat. Wash., § 2827, as amended by Acts 1923, c. 137, § 6, imposing a license tax on dealers in agricultural seeds, to be used in paying the expense of inspection of seeds by the director of agriculture, who is required to inspect all seeds for sale in the state, but which exempts from such tax dealers in seeds grown within the state and purchased from the producers, is invalid as discriminating against seeds grown in other states and imposing an unauthorized burden upon interstate commerce.—Boyce v. French, U. S. D. C., 293 Fed. 43.

24.——Local Tax.—(b) Where a foreign corporation rents and maintains an office in this state, with a stock of samples and a force of office employees and traveling salesmen, merely to obtain orders in this state and other states, subject to approval by its home office, for its goods to be shipped directly to its customers from its home state, such an arrangement is part of its interstate commerce, and not subject to a local excise tax.—Dennison Mfg. Co. v. Wright, Ga., 120 S. E. 120.

25.——Main Line.—A cause of action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) arises if a railroad employee was injured on main line of an interstate carrier, while unloading ties to be used in repairing the main track of said railroad.—Missouri Pac. R. Co. v. Hall, Ark., 255 S. W. 707.

26.——Interstate.—The rule established by the Supreme Court of the United States that a workman repairing the track of a railroad over which interstate as well as local business is done is engaged in interstate commerce, and if negligently injured may maintain an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), applies, although the road is situated wholly in one state.—Coil v. Payne, Kan., 220 Pac. 172.

27.——Intrastate Train.—That an intrastate train followed an interstate train, and received some assistance from it in extricating itself from a blockade, held not to create such interdependent relation between the two trains as impressed the intrastate train with an interstate character and brought it within the Hours of Service Act (Comp. St. §§ 8677-8680), where its crew did nothing other than to accomplish the movement of its own train. United States v. Colorado, W. & E. Ry. Co., U. S. C. C. A., 292 Fed. 916.

28. **Constitutional Law**—License.—The exemption promised in Acts 1915, p. 923, permitting persons practicing dentistry in the state for a period of 20 years or more to continue in that practice without obtaining a license from board of dental examiners, held not a contract which a subsequent Legislature could not repeal.—Samples v. State, Ala., 98 So. 211.

29.——Police Power.—Act March 23, 1917 (P. L., p. 208), authorizing municipalities to enact ordinances regulating the opening and closing of barber shops, is not obnoxious either to the Fourteenth Amendment of the Federal Constitution or to paragraph 1 of article 1 of the Constitution of this state, but is a legitimate exercise of the police power to the extent that such regulation is not unreasonable.—Falco v. Atlantic City, N. J., 122 Atl. 610.

30. **Contracts**—Illegal Contract.—C. E. Smith Company, a co-partnership, sued the Southern Flour & Grain Company for the difference between the contract price of certain beet pulp and its price on resale. From the petition it appears that the contract between the parties stipulated for the purchase of "beet pulp" in bags of 88 pounds each. By general demurrer the defendant presented the contention that the contract sued on was void and illegal, for the reason that it was violative of section 2107 of the Civil Code of 1910, requiring that "all concentrated commercial feeding stuffs shall be in standard weight bags or packages of fifty, seventy-five, one hundred, one hundred and twenty-five, and one hundred and fifty, one hundred and seventy-five, or two hundred pounds each." Defendant insists that the overruling of its demurrer was error. Held, where the terms of a contract directly involve the infraction of a civil statute, not enacted for the purpose of raising revenue, and such infraction is penalized by a fine, or imprisonment, or both, the contract is void and unenforceable.—Southern Flour & Grain Co. v. Smith, Ga., 120 S. E. 36.

31.——Performance.—A party to a contract cannot willfully and in bad faith disable himself from complying with any condition thereof, nor fraudulently prevent performance by the opposite party of any of its conditions, and thereby derive any benefit or escape any liability.—Householder v. Nispel, Neb., 195 N. W. 932.

32. **Corporations**—Place of Meeting.—Where all common stockholders and directors participated in a corporate trust deed, and there was a waiver of notice, etc., an objection that the meeting at which the deed was authorized was held in Florida, while the habitat of the corporation was in Ohio, is without merit.—American Cleaning Co. v. Walkill Stock Farms Co., U. S. D. C., 293 Fed. 58.

33.——Service.—"An agent of a domestic corporation, whose principal place of business is in another county in this state, whose contract of employment demands of him the exercise of judgment and discretion in the business affairs of his principal, and who has charge of the property and business of his principal in the locality where he is stationed, is 'a managing agent,' upon whom service of summons may be made."—Kron v. J. C. Robinson Seed Co., Neb., 195 N. W. 939.

34.——Stock Issue.—The issuance of a large amount of stock by the trustees of a corporation in exchange for property of less value than par value of the stock is not a fraud on subsequent stockholders, where all the then trustees and stockholders knew and approved the transaction.—Metcalfe v. Mental Science Industrial Ass'n, Wash., 220 Pac. 1.

35. **Highways**—"Defect."—A steam roller, permitted to stand in the highway without any barrier or lights on it in the nighttime, is a "defect,"

within Highway Law, § 176, as amended by Laws 1922, c. 371, § 17, making the state liable for defects causing damage to persons on highways maintained by the state pursuant to section 170.—Treman v. State, N. Y., 201 N. Y. S. 835.

36.——Material.—Under Highway Commission Act, § 18, being Burns' Ann. Supp. 1921, § 7671a2, providing that contractor's bond shall be conditioned on payment by contractor and subcontractor of all indebtedness on account of materials furnished in the construction of a highway, feed furnished for horses used in construction work by a subcontractor was material furnished to carry forward, perform, and complete the contract.—Federal Paving Co. v. Raschka, Ind., 141 N. E. 644.

37. **Injunction** — Zoning Resolutions. — Where plaintiffs show that they will sustain special damages, if defendant is permitted to erect a proposed building in violation of zoning resolutions, they are entitled to equitable aid enjoining the same.—Cohen v. Rosevale Realty Co., N. Y., 202 N. Y. S. 95.

38. **Insurance**—Measure of Damages.—Under an automobile insurance policy, protecting a dealer against conversion of a car by a buyer before it was fully paid for, which provided that insured would be indemnified "against any and all pecuniary loss or losses" sustained by conversion, and which required proof of loss to state the "amount of actual cash due to the insured at the time of loss," held that the measure of recovery was the amount due the insured under the contract of sale at the time of conversion, and not the value of the car itself at that time.—Lozier Automobile Exch. v. Interstate Casualty Co., Iowa, 195 N. W. 885.

39.——Material Representation.—Plaintiff sued an insurance company on a policy of insurance against fire loss of his household furniture, which the policy stated were located in the residence of the insured, owned by him, and provided that the insurance should only continue while said goods were contained in the insured's residence. The policy contained a fortfeiture clause which did not expressly provide for a forfeiture in case of false statement by the insured as to the ownership of the building in which the household goods were located. The insurance company defended on the ground that the representation of ownership of the building was material, and, being false, avoided the policy. Held that, under the provisions of the policy in question, the ownership of a building in which the goods of insured were located was not material, and a false statement by the insured as to such ownership did not avoid the policy.—Mississippi Fire Ins. Co. v. Dixon, Miss., 98 So. 101.

40.——Theft.—In an action by the insured upon a policy of insurance against loss by theft which provides that the insurer shall not be liable beyond the actual cash value of the property at the time any loss occurs, it is incumbent on the insured to prove the value of the property at the time the loss occurs.—Goodell v. Union Automobile Ins. Co., Neb., 196 N. W. 112.

41.——Void Policy.—A life insurance policy provided that it should be null and void if the insured lost his life 'in consequence of a violation of the laws of the state or of the United States or of any other province or nation, whether the member be at the time sane or insane." The insured lost his life in consequence of a violation of the criminal laws of the state. The evidence on behalf of the beneficiary suing tended to show that the deceased was insane at the time of his death. Held that the clause in question simply meant that if the insured lost his life in consequence of an act which would have amounted to a violation of the laws of the state if he had been sane, the policy should be void, even though he was insane at the time of such act.—Sovereign Camp, W. O. W., v. Hunt, Miss., 98 So. 62.

42. **Landlord and Tenant**—Landlord Liable.—Where a fire escape platform in the rear of a tenement house was used by the occupants, including the landlord, as a balcony on which to stand while hanging out laundry to dry, a tenant who was injured by falling through an opening in the railing, which had always been protected by an iron ladder suspended on hooks, but which had been lowered by the landlord without notice to the tenant, was not deprived of her right to recover for personal negligence of the landlord by Tenement House Law, § 16, subd. 2, prohibiting any person from placing any incumbrance before or on any fire escape.—Malcolm v. Thomas. N. C., 201 N. Y. S. 849.

43. **Licenses**—Blue Sky Law.—One who assists another in making a sale of securities requiring a permit under the Blue Sky Law, which has not been granted, is not saved from being "a party to the illegality" by the fact that he does not know whether or not a permit had been obtained. —Weisendanger v. Lind, Kan., 220 Pac. 263.

44.——Ticket Brokers.—General Business Law, amended by Laws 1922, c. 590, by the addition of article X-B, §§ 167, 168, prohibiting the reselling of theater tickets without a license, and restricting the resale price to not more than 50 cents in excess of the price charged by the theater, to protect the public against exorbitant prices, held a proper exercise of the police power, and the fact that it limits the profits on reselling, without regard to the number of sales, does not make it confiscatory. —People v. Weller, N. Y., 202 N. Y. S. 149.

45. **Livery Stables and Garage Keepers**—Storage Lien.—While the business of a garage keeper is similar to that of a livery stable keeper, in which carriages are kept for hire, no lien for storage existing at common law in favor of livery stable keeper, none exists for garage keepers; and the only lien recognized is that defined in Code, § 3137. —A. G. Graben Motor Co. v. Brown Garage Co., Iowa, 195 N. W. 752.

46. **Municipal Corporations** — Franchise.—The right to run motor busses for hire upon the city streets is a "franchise" within the meaning of a charter provision requiring the board of commissioners to submit ordinances granting such franchises to popular vote when petitioned by 500 voters.—McCutcheon v. Wozencraft, Tex., 255 S. W. 716.

47.——Speed Laws.—Ordinance of city of San Antonio, limiting speed of a motor vehicle in nonbusiness districts, to 20 miles per hour, being at the time of its enactment in conflict with the law then in force, namely, Acts 35th Leg. 1917, c. 207, § 20, being Vernon's Ann. Pen. Code Supp. 1918, art. 820o (prior to its amendmtnt by Acts 38th Leg. c. 155, fixing the speed limit in a city at 20 miles per hour), limiting speed of a motor vehicle to 25 miles per hour, and section 23 (article 820r) expressing an intention of the Legislature to assume control of the speed limit of motor vehicles on the highways both in and out of incorporated cities, the ordinance was invalid and incapable of supporting a conviction for its violation.—Ex parte Curry, Tex., 255 S. W. 730.

48. **Negligence**—Automobile Driver's Guest.—The driver of an automobile owes to his gratuitous guest the duty of exercising "ordinary care," which is that degree of care that an ordinarily prudent person would exercise under like or similar circumstances.—Vogel v. Otto, Wis., 195 N. W. 859.

49. **Sales**—False Representation.—Knowledge by a purchaser of an automobile concerning a defect in it is not sufficient to affect the consequences of false representations fraudulently made in the sale of the car, where the seller assures the purchaser that the defect is a trifle which can be easily remedied.—Logan v. Collinson, Kan., 220 Pac. 291.

50.——Title.—Where a motor company sold an automobile on installments by taking the purchase price from a financing corporation, which in turn took a conditional sales contract from the purchaser, the motor company, on default in payments of installments by the purchaser, had no right to assume possession of the car sold whether the contracts of conditional sale were valid or not, it having parted with all its title at the time of the original sale, and its receiver had no greater right, and surrender of possession vested no title in it or its receiver.—Lloyd v. Macallum-Donahoe Co., Wash., 219 Pac. 849.